



No. 82-2042

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

CHRISTINE VAUGHN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

JACK GREENBERG
JAMES M. NABBIT, III
CLYDE E. MURPHY*
CHARLES STEPHEN RALSTON
O. PETER SHERWOOD
RONALD L. ELLIS
JUDITH REED
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

JOHN W. WALKER
1191 First National Building
Little Rock, Arkansas 72201

ZIMMERY CRUTCHER, JR.
Mays, Crutcher & Brown
Suite 836
One Union National Plaza
Little Rock, Arkansas 72201

Counsel for Respondent

* Counsel of Record

QUESTIONS PRESENTED

1. Once a defendant has articulated a legitimate non-discriminatory reason for its challenged conduct, is the court limited in the type of evidence it may consider in determining whether that articulation is pretextual?

2. Whether the district court's finding of discrimination, affirmed twice by the Court of Appeals, was clearly erroneous?

3. When discriminatory animus has been shown to have been a substantial factor in an employment decision, can an employer escape liability under Title VII by showing that other factors played a part in the employment decision?

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Opinions Below	1
Statement of the Case	2
Summary of Argument	17
ARGUMENT	
I. The District Court In A Title VII Case Has An Obligation To Consider The Entire Record In Making Its Determination Of Whether Discrimination Has Occurred	21
II. The Findings of the District Court Were Not Clearly Erroneous	32
III. The Circuit Courts Have Consistently And Appropriately Applied The McDonnell Douglas-Burdine Formulation	38
IV. An Employer Cannot Escape Liability Under Title VII Once Discriminatory Animus Has Been Shown To Have Been A Substantial Factor In An Employment Decision	40
CONCLUSION	47

TABLE OF AUTHORITIES

Page

Cases

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978)	12,29
Danzl v. North St. Paul Maplewood- Oakdale Independent School District No. 622, 706 F.2d 813 (8th Cir. 1983)	40
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	12,29
Johnson v. Bunny Bread Company, 646 F.2d 1250 (8th Cir. 1981)	39
James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), <u>cert. denied</u> , 434 U.S. 1034 (1978)	36
Locke v. Kansas City Power & Light Co., 660 F.2d 359 (8th Cir. 1981) ...	40
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	<u>passim</u>
Morton v. Mancari, 417 U.S. 535 (1974)	43
Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)	20,40,45
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	17,30,32,34

	<u>Page</u>
Robbins v. White-Wilson Medical Clinic, 642 F.2d 153 (5th Cir. 1981)	36
Robinson v. Arkansas State Highway and Transportation Commission, 698 F.2d 957 (8th Cir. 1983)	40
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	<u>passim</u>
United States Postal Service Board of Governors v. Aikens, ___ U.S. ___, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983)	<u>passim</u>
United States v. Yellow Cab, 338 U.S. 338 (1949)	20,36
Vaughn v. Westinghouse Electric Corp. 471 F. Supp. 281 (E.D. Ark. 1979) <u>aff'd</u> , 620 F.2d 655 (8th Cir. 1980), <u>vacated sub nom</u> , Westinghouse Electric Corp. v. Vaughn, 450 U.S. 972 (1981), <u>on remand</u> , 646 F.2d 335 (8th Cir. 1981)	<u>passim</u>
Vaughn v. Westinghouse Electric Corp., 523 F. Supp. 368 (E.D. Ark. 1981), <u>aff'd</u> , 702 F.2d 137 (8th Cir. 1983) <u>cert. granted sub nom</u> Westing- house Electric Corp. v. Vaughn, ___ U.S. ___, 52 U.S.L.W. 3309 (Oct. 17, 1983)	<u>passim</u>
Vaughn v. Westinghouse Electric Corp., No. LR-C-215 (E.D. Ark., Order filed May 23, 1979)	11

Page

Statutes and Rules

Title VII of the Civil Rights Act of
1964, 42 U.S.C. § 2000e et seq. 2,41,42,43

The Equal Employment Opportunity
Act of 1972, P.L. 92-261 31,43

Rule 52(a), Fed. R. Civ. P. 32,34

Other Authorities

Legislative History of Title VII
and XI of the Civil Rights
Act of 1964 42

Leg. Hist., 1972 Act, p. 1767 44,45

No. 82-2042

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

CHRISTINE VAUGHN

Respondent.

On Writ of Certiorari to the United
States Court of Appeals for the
Eighth Circuit

BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix A to the Petition for Certiorari (Pet A) and is reported at 702 F.2d 137

(8th Cir. 1983). The opinion of the United States District Court for the Eastern District of Arkansas appears in Appendix B to the Petition for Certiorari (Pet B) and is reported at 523 F. Supp. 368 (E.D. Ark. 1981). The initial opinion by the court of appeals (Joint Appendix (J.A.) 346) is reported at 620 F.2d 655 (8th Cir. 1980). The initial opinion by the district court (J.A. 324) is reported at 471 F. Supp. 281 (E.D. Ark. 1979).

Statement of the Case

This lawsuit was filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to redress claims of discrimination in employment on the ground of race.

The respondent, Christine Vaughn, a black female, was hired by the petitioner, Westinghouse Electric Corporation, on July

13, 1970, as a sealex machine operator, labor grade 4 (J.A. 24). Ms. Vaughn functioned as a sealex operator under the supervision of Mr. Roger Maynard (J.A. 27) and, under his supervision became a fully qualified sealex machine operator on November 16, 1970 (J.A. 249-250; Tr. 685, 646-47). On that day she transferred to the second shift under the supervision of Mr. O. D. Brazil (J.A. 287, DX 35a).

Mr. Brazil had been the subject of a number of employee complaints (Tr. 523; J.A. 152-153) and had been counselled by both petitioner's chief personnel officer, W.T. Hunnicutt, and the plant manager (Tr. 683-84). Respondent Vaughn encountered considerable difficulty under Brazil's supervision due to the disparity in treatment he exhibited toward black and white employees (J.A. 38-39). She complained on several occasions about harassment by

Brazil to the petitioner's personnel officer, but to no avail:

[H]e was constantly on more blacks ... than he was whites. It was some whites that he gave problems, but basically, blacks.

(Tr. 11; J.A. 31). After seeing no results from her complaints to management, Ms. Vaughn filed a charge with the EEOC (Tr. 12; J.A. 32). Thereafter, Ms. Vaughn's activities came under close company surveillance (Tr. 13; J.A. 32-33). ^{1/}

The principal concern Mr. Brazil expressed regarding the respondent involved Ms. Vaughn's attendance record, and he wrote two memos to the file on that subject (J.A. 246; DX 460a, b). Although Brazil testified that he was also unhappy

^{1/} The record in this case also reveals the experience of another black employee, Glenda Crutcher, who apparently was identified as a "trouble-maker" under one supervisor and became the object of close scrutiny under another. (Tr. 350-363).

with Ms. Vaughn's level of production, he never documented these concerns. A written contemporaneous expression of his view of her competence to perform the job, signed by both Ms. Vaughn and Supervisor Brazil on January 18, 1971, reveals that he was satisfied with her performance (J.A. 295, DX 36). However two days later Mr. Brazil wrote another memo indicating his dissatisfaction with Ms. Vaughn's performance (J.A. 293-4; DX 34). At no time has Brazil or any witness for petitioner sought to explain away these contradictory evaluations of Ms. Vaughn's performance.^{2/}

On January 25, 1970 Ms. Vaughn was again transferred, this time to the third

^{2/} In its brief petitioner now contends that the January 18 memo was "inadvertently erroneously recorded," however there is nothing in this record to support that contention. Petitioner also introduced into evidence a "bump sheet", which indicates where an employee may be placed in the event of a reduction in force, dated

shift under the supervision of Mr. Clint T. Tusnage (J.A. 28, 286, DX 35p). Ms. Vaughn testified that she was aware that employees were expected to make a certain rate of production but had never been advised that excessive waste could be a cause for disqualification (J.A. 43). Turnage testified that Vaughn had been warned on several occasions about inadequate production and excessive shrinkage (J.A. 224). He conceded that he did not tell Ms. Vaughn what production standard she was expected to achieve, (J.A. 224) but asserted that she had been warned about the shrinkage problem (J.A. 224). Petitioner introduced some handwritten notes Turnage claims to have made at

2/ continued

December 8, 1975, which designated Vaughn as qualified to hold the position of sealex machine operator by virtue of prior satisfactory performance. Petitioner claimed this document to be the result of a clerical error (J.A. 136-138; DX 45).

the time he discussed production and shrinkage with Ms. Vaughn, but it declined to offer corroborating testimony by any of the union shop stewards Turnage claimed were present at those meetings with Ms. Vaughn.

On April 19, 1971, Mr. Turnage disqualified Ms. Vaughn as a sealex operator. He communicated this decision directly to Ms. Vaughn but told her he had been notified by the front office to disqualify her (J.A. 51). However, Turnage not only disqualified respondent but he also decreed that she would never in the future be eligible to become a sealex operator (J.A. 312, DX 41). Her position was then filled by a white employee (J.A. 35).

There is no indication in the record that disqualification always carries with it a stipulation that the employee could never in the future be given an opportunity to requalify. Petitioner's personnel

officer explained that permanent disqualification is warranted only in the event of an assessment that the employee in question was physically incapable of performing the job (J.A. 139-141). Yet Turnage and respondent believed that Ms. Vaughn's failure to make production was a result of her desire to bid off the sealex operator job, not ability (J.A. 223, 226). If Turnage believed Ms. Vaughn's problems related to a lack of motivation, it was simply inappropriate for him to disqualify her and bar her forever from re-qualifying unless his motivation was to "fix" this complaining employee "for good."

In addition to this evidence specifically challenging the assertions of the respondent regarding the basis for Ms. Vaughn's disqualification, the district court also gave careful consideration to other record evidence in an effort to place

the decisionmaking regarding Ms. Vaughn and the other named plaintiffs in the proper context, and to determine the motivation for that decisionmaking. Vaughn, 523 F. Supp. at 370, (Pet. B-4). The district court noted the past history of discriminatory employment practices of the defendant and its lack of significant improvement up to the time of trial. The court found that going back to July 2, 1965, the effective date of Title VII, almost no blacks were employed by the defendant. 471 F. Supp. 281, 284 (E.D. Ark. 1979) (J.A. 326). Similarly, the court found that only 3 of 22 office and clerical employees were black; that no blacks had ever been employed as supervisors in the defendant's office force; that only 2 of 25 or 26 supervisors who held entry-level management jobs were black;^{4/} and that while the defendant's overall work-

^{4/} At the time Ms. Vaughn was disqualified

force was roughly representative of the proportion of blacks and whites in the relevant population, blacks were almost exclusively concentrated in production jobs, which were lower paying. Id. at 284 (J.A. 326).

The court also deemed probative of discriminatory intent, the petitioner's inability to explain the disproportionately

4/ continued

as a sealex machine operator all foremen were white (Tr. 20, 69-70). During this period there was considerable racial tension at the plant between black workers and first-line supervisors (Tr. 30, 64, 151, 350-1). This condition resulted in several complaints to management of mistreatment and it spawned the filing of a number of complaints with the Equal Employment Opportunity Commission. (Tr. 12, 54, 159, 180, 358). According to a union shop steward who handled many of the complaints of black employees, the friction between black employees and foremen was greatest on the third shift. (Tr. 143). Ms. Vaughn was assigned to the third shift at the time of her disqualification. (Tr. 564).

low number of blacks obtaining positions given the high number of blacks applying for jobs at Westinghouse id. at 284-284 (J.A. 327); ^{5/} as well as the fact that of 65 persons discharged between 1972 and 1978, 39, or 60%, were black - a figure far above the proportion of black employees, which was approximately 24 or 25%. Id. at 285 (J.A. 328).

In an unpublished order, the trial court explained the rationale for its holding: "Defendant simply failed to articulate a legitimate, nondiscriminatory reason for Ms. Vaughn's disqualification." Vaughn v. Westinghouse Electric Corp., No. LR-C-74-215 (E.D. Ark., Order filed May 23, 1979). ^{6/}

^{5/} Tr. 277-279.

^{6/} The relevant portion of this Order is reproduced at Vaughn v. Westinghouse Electric Corp., 620 F.2d at 659 (J.A. 340)

The petitioner, Westinghouse, appealed that decision alleging (1) that the district court misapplied the appropriate burden of proof standards and (2) that the district court's factual findings were clearly erroneous. Vaughn v. Westinghouse Electric Corp., 620 F.2d 655, 656 (8th Cir. 1980). (J.A. 346) The court of appeals held that the district court's opinion was consistent with the decisions of this Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); and Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

Reviewing the record and the trial court's reasoning, the Eighth Circuit, one judge dissenting, held that the lower court had not misapplied the appropriate burden of proof standards, and further held that, even if the trial court had found the

reasons articulated by Westinghouse to be legitimate and nondiscriminatory, there was sufficient evidence in the record to find those reasons to be a pretext for discrimination. Vaughn, 620 F.2d at 660 n. 4 (J.A. 355).

Similarly, the Eighth Circuit rejected Westinghouse's contention that the trial court's factual findings were clearly erroneous, holding instead:

[W]e are not "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 368, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

Vaughn, 620 F.2d at 660 (J.A. 354). The Eighth Circuit denied the defendant's petition for rehearing en banc and the defendant subsequently petitioned for review in this Court.

On March 9, 1981, the Court granted a writ of certiorari and summarily vacated the judgment of the court of appeals,

remanding the cause to the Eighth Circuit for further consideration in light of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which had been decided five days earlier. Westinghouse Electric Corp. v. Vaughn, 450 U.S. 972 (1981). The court of appeals in turn remanded the cause to the trial court with directions to reconsider in light of Burdine. Vaughn v. Westinghouse Electric Corp., 646 F.2d 335 (8th Cir. 1981). (J.A. 361)

Following an in-chambers conference with counsel, the parties were instructed to brief two issues: (1) whether, in light of Burdine, the trial court erred in its initial holding that the defendant had failed to meet its second-stage burden of articulating a legitimate, nondiscriminatory reason for disqualifying plaintiff from her job; and (2) whether, if defendant

did in fact meet this second-stage burden of production, plaintiff should nevertheless recover because she has, on the whole case, met her burden of persuading the Court by a preponderance of the evidence that her disqualification was motivated at least in part by her race. Vaughn, 523 F.2d at 369 (Pet. B-2).

The trial court, acknowledging the holding in Burdine, that "Although 'the defendant's explanation of its legitimate reasons must be clear and reasonably specific,' 101 S.Ct. at 1096, '[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.' Id. at 1094", answered the initial question in the affirmative, observing:

Burdine holds that the defendant's burden once plaintiff makes a prima facie case, is one of production only, not of persuasion.

Vaughn v. Westinghouse Electric Corp., 523 F. Supp. 368, 370 (E.D. Ark. 1981) (Pet. B-2).

As to the second question, the trial court, reviewing the testimony and other evidence offered at trial, and considering the record as a whole, reaffirmed its prior factual findings, and held that because the plaintiff was disqualified in part because of her race, the defendant's conduct violated Title VII. Id. at 371. (Pet. B-6).

Reviewing this record for a second time, the court of appeals found that the lower court's consideration of the record as a whole was sufficient along with its detailed factual findings, to support a conclusion that Vaughn was unlawfully disqualified from her job as a sealex operator. Specifically, the court of appeals held that the decision of the lower court was not clearly erroneous. Vaughn v.

Westinghouse Electric Corp., 702 F.2d 137,
139 (8th Cir. 1983) (Pet. A-4).

Summary of Argument

In its quest for new factual findings in this Court, the petitioner has couched its argument in terms which suggest that its "articulation" under McDonnell Douglas and Burdine, went unanswered in the district court. In so doing, the petitioner misrepresents the record below, and seeks a ruling that is inconsistent with this Court's approach of allowing some leeway for the lower courts to adjust to varying fact patterns: an approach which avoids the necessity for this Court to state inflexible rules regarding when discriminatory intent has been established. Pullman-Standard v. Swint, 456 U.S. 273 (1982).

This Court has made it plain, and the courts of appeal have generally under-

stood, that McDonnell Douglas provides an analytical framework for evaluating claims of employment discrimination which should be applied in a sensible and flexible manner. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal service Board of Governors v. Aikens, ___ U.S. ___, 75 L.Ed.2d 403 (1983).

Here, the district court and the court of appeals reconsidered their holdings in light of Burdine and correctly anticipated the thrust of this Court's holding in Aikens. The lower court considered and weighed all the evidence and was persuaded that a discriminatory reason more than likely motivated the employer. Burdine, 450 U.S. at 256; Aikens, 75 L.Ed.2d at 410.

Contrary to the assertions of the petitioner, documentary evidence was intro-

duced at trial which supported the assertions of respondent that she was, and continued to be, qualified. Moreover, in its effort to determine the motivation or intent of an act that had occurred eight years previously, the court also considered statistical and testimonial proof as to the defendant's practices as well as the effects of those practices, and firmly established the context in which the defendant's employment decisions must be judged. Notably, while the policy and practice type evidence surely applied to each of the three original plaintiffs' circumstances, it was only the respondent, Ms. Vaughn, who through testimony and documentary evidence countered petitioner's claims of incompetence and ultimately prevailed under Title VII.

The issue before this Court is whether the evidence taken as a whole establishes

sufficient evidence from which the district court could have drawn the conclusion that a violation of Title VII occurred. The Eighth Circuit has on two occasions supported the district court, affirming that its findings were not clearly erroneous. Swint. See also United States v. Yellow Cab, 338 U.S. 338 (1949).

The petitioner's reliance on Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), is similarly misplaced. The legislative history of Title VII makes it clear that Congress intended that if race played any part in an employment decision then a violation of the statute has occurred. The question of whether other factors would have resulted in the same decision in the absence of discrimination affects only the remedy that is appropriate, not whether a substantive violation has occurred.

ARGUMENT

I

The District Court In A Title VII Case Has An Obligation To Consider The Entire Record In Making Its Determination Of Whether Discrimination Has Occurred

In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, this Court set forth the basic allocation of burdens and order of proof in a Title VII case alleging discriminatory treatment.

In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), this Court made plain the limited nature of the defendant's second stage "articulation" requirement. There the Court held that the burden which shifts to the defendant at stage two is to rebut the presumption of discrimination by "producing evidence" that the disputed employment action was made for a "legitimate, nondis-

criminatory reason." This is accomplished, the Court held, through the introduction of admissible evidence of the reasons for the employment action. 450 U.S. at 255.

Burdine reaffirms the force of McDonnell Douglas and emphasizes the fact that, notwithstanding the minimal burden of producing evidence which the defendant faces, he nonetheless has a powerful incentive to produce more if he is to prevail. Burdine, 450 U.S. at 258. It follows that meeting that burden does not assure success for the defendant, even if the plaintiff offers no new evidence in support of his claim that the defendant's reason is pretextual. Burdine, 450 U.S. at 255, n.10. Rather, the articulation merely establishes the existence of a question of fact for the trial court. Id. at 255. Once that is established, the court must weigh the evidence, giving it whatever

credence or weight it deserves, and decide the issue of discrimination vel non on the record as a whole. See United States Postal Service Board of Governors v. Aikens, ____ U.S. ____, 75 L.Ed.2d 403 (1983).

Here the petitioner argues for a rule that would strictly limit the order as well as the type of proof that a court may review in determining who prevails on the ultimate question in an individual Title VII lawsuit. Moreover, petitioner's formulation effectively strips plaintiff of the opportunity to show, "that a discriminatory reason more likely motivated the employer" Burdine, 450 U.S. at 256, and strictly limits the plaintiff's proof to directly attacking the employee's articulated reason, thereby "showing that the employer's proffered explanation is unworthy of credence", Id. Of course, neither Burdine, 450 U.S. at 255, n.10,

McDonnell Douglas, 411 U.S. at 804-805 nor Aikens, 75 L.Ed.2d at 409, n.3 require or endorse such a formulation.

In the case at bar, the respondent's prima facie case was established by the fact that she is a member of a protected group; she was fully qualified for her position; she was disqualified by her supervisor from that position; and the position was subsequently filled by a member of the majority group.

The defendant satisfied its burden of articulation by an assertion that Ms. Vaughn was disqualified because of her failure to make production.

The employer's articulation established that there was an issue of fact to be decided, and paved the way for the court to determine whether the plaintiff had proven by a preponderance that the reasons stated were mere pretexts for discrimination.

Burdine does not demand that only evidence of a specific type or character may be considered in opposition to the defendant's articulation. Indeed, the type of evidence presented will inevitably turn on the specifics of the particular case and the strength of the defendant's articulation. As this Court stated unequivocally in Aikens:

As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves. Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent. See IBT v. U.S., 431 U.S. 324, 358 n. 44, 52 L.Ed. 2d 396, 97 S.Ct. 1843 (1977) ("[T]he McDonnell Douglas formula does not require direct proof of discrimination".)

Aikens, 75 L.Ed.2d at 409, n.3.

Consistent with McDonnell Douglas, Burdine and Aikens, the district court considered respondent's direct evidence challenging the petitioner's articulation,

as well as respondent's circumstantial evidence establishing the general policy and practices of the defendant which placed the decisionmaking in context and aided the court in determining the motivation for the employer's act.^{7/}

The district court's careful consideration of the record below is amply demonstrated by the careful analysis it gave to the claims of respondent Vaughn and the other original plaintiffs, Ms. Gee and Ms. Crutcher. Notwithstanding the fact that

^{7/} The petitioner concedes, as it must, that under Aikens "a trial court must not use the McDonnell-Burdine formula as a stilted mechanism by which to structure the representations of the parties," and that "because of the very nature of 'state of mind' or 'intent' evidence, the plaintiffs may offer either direct or circumstantial proof, or both, in order to show pretext. Aikens, supra at ___, 103 S.Ct. 1282-83." (Brief for Petitioners 13.) Petitioner similarly concedes, "that the employer's pattern or practice of discrimination is admissible to show pretext" and that the trial court "should consider the entire record" in order to decide the ultimate question. (Id. at 13.)

each of the plaintiffs relied on much the same contextual evidence, only respondent prevailed on the whole record.^{8/}

In the cases of Ms. Crutcher and Ms. Gee the court made detailed findings and concluded that the evidence unambiguously demonstrated that the two women performed poorly; had been given adequate training; were treated fairly; and had been in one instance abusive with supervisors and in another so incompetent as to have nearly caused an injury to a fellow worker or harm to the machine.^{9/}

However, with respect to Ms. Vaughn, the district court found that there was documentary evidence showing Vaughn's satisfactory performance as a sealex machine

8/ Indeed the district court found against Vaughn on four other claims of racial discrimination. Vaughn, 471 F. Supp. at 289 (J.A. 336).

9/ Vaughn, 471 F. Supp. at 286-288 (J.A. 330-335).

operator, Vaughn, 523 F. Supp. at 372 (Pet. B-5);^{10/} and that she had received regular raises in her position, which was an indication of satisfactory performance, until shortly before she was disqualified Id. (Pet. B-5).^{11/} (J.A. 338). Several witnesses testified that blacks were more closely scrutinized than their white peers. Plant rules were enforced against blacks but ignored as to whites; blacks were required to perform tasks not required by similarly situated whites; when black employees complained management appeared to find ways to uphold even arbitrary supervisory action. Not surprisingly blacks tended to be disciplined, and discharged in grossly disproportionate numbers. (See supra, pp. 2-11.)

^{10/} See J.A. 295, DX 36, DX 45.

^{11/} See J.A. 287-292, DX 35q-v.

On remand, the district court noted that its prior opinion described in detail the circumstantial evidence of intent which served to place the employer's individual personnel action "in the broader context of defendant's actions over a substantial period of time."^{12/} The court then went on to reaffirm its prior findings, observing that they had been upheld by the court of appeals, and made additional findings which related directly to Ms. Vaughn's disqualification. Vaughn, 523 F. Supp. at 370-381 (Pet. B-4, 5).

This Court's line of cases from McDonnell Douglas to Aikens^{13/} fully recog-

^{12/} Vaughn, 523 F. Supp. 368, 370 (Pet. A B-4), citing Vaughn, 471 F. Supp. at 283-86 (J.A. 326-329)

^{13/} Purnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

nize that the ultimate burden of proof in a particular employment discrimination case, as with any other type of civil litigation, rests with the plaintiff, and respondent does not seek to escape that burden. However, the petitioner apparently seeks to add substantially to that burden by severely restricting the type of evidence a plaintiff may present and how that evidence may be weighed on the question of pretext, thereby isolating the individual decision from its general practices regarding minorities.

McDonnell Douglas and its progeny express a keen sensitivity to and awareness of the societal concerns that led to the passage of Title VII in 1964. The Act reflects a national consensus that discrimination based on race and sex has been a pervasive problem in American society. Moreover, a primary focus of that problem was employment, in which blacks, other minori-

ties, and women were consistently relegated to lower paying positions regardless of other qualifications or merit. Given the pervasive and all-encompassing nature of the problem, Congress not only enacted Title VII in 1964, but strengthened it and broadened its scope by the Equal Employment Opportunity Act of 1972.

This Court's ruling in Burdine made plain the simple nature of the employer's burden in meeting the plaintiff's prima facie case. To follow that ruling by greatly restricting the plaintiff's ability to place the employer's action in the context of his general policy with regard to minority employment, would seriously curtail the ability of an individual plaintiff to establish the state of mind of his employer, or to otherwise establish pretext. The evidence adduced below showed an employment situation of subjectivity and discre-

tion regarding all types of employment decisions. (J.A. 170.) The same subjective and discretionary decisionmaking process that led to the disqualification of Ms. Vaughn was also at work in hiring, discipline, and dismissal decisions which were shown to be consistently adverse to blacks.

II

The Findings of the District Court Were Not Clearly Erroneous

In Pullman-Standard v. Swint, 456 U.S. 273 (1982) this Court underlined the importance of the proper application of Rule 52(a), Federal Rules of Civil Procedure, in reviewing the factual findings made by the district court. Moreover, the Court explicitly held that issues of intent are properly treated as factual matters by the trier of fact. Id at 288.

The concerns expressed in Swint were certainly understood by the Eighth Circuit,

which on two separate occasions has upheld the factual findings of the district court. In its most recent opinion in this case, that court held:

The factual findings of the district court should not be overturned unless the reviewing court is left with the definite conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). We cannot say, after a review of the record, that we are left with a definite conviction that a mistake was committed in the district court's findings of fact.

Vaughn, 702 F.2d at 139 (Pet A-4).

As the reviewing court found on two occasions the record amply supports the findings made by the district court. Indeed while the petitioner claims that its allegations of incompetence were unrebutted, its review of the district court's findings necessarily points to the factual basis for the district court's holding to the contrary.

The court's findings are buttressed by the fact that the district judge made a tour of the plant to observe the operation of the petitioner. The petitioner has not challenged the accuracy of the testimony or statistical evidence which formed the basis of the district court's holding. Instead it seems to challenge the weight given this evidence by the district court. Respondent submits that such an attack cannot prevail under Rule 52(a) or this Court's holding in Swint.

The district court was well aware of its responsibility to make the "sensitive and difficult" determination of an employer's "state of mind." See Aikens, 75 L.Ed.2d at 411. As such, that court was ever mindful of the fact that other evidence of discrimination occurring during the relevant time period might be probative of the employer's motivation. Accordingly

the district court admitted evidence tending to show the arbitrary and unequal exercise of supervisory discretion. (J.A. 61,170; see also Tr. 69, 206-07, 275, 309).

While on the one hand the petitioner presented testimony that Ms. Vaughn had performed her job poorly, there was contrary documentary evidence that her prior supervisors had considered her work entirely satisfactory. Indeed, the fact that Ms. Vaughn received progressive pay increases strongly suggests that her performance had been adequate to the task (Tr. 640-637; J.A. 338). In the face of conflicting assertions of competence, with no objective standards to apply in resolving that conflict, and petitioner's unsuccessful efforts to explain away its own admissions that Ms. Vaughn was qualified to perform the job, the trial judge properly concluded that discrimination had occurred. This conclusion was reached

after the trial court toured the plant, heard testimony while observing the demeanor of the witnesses, and considered all the evidence before it. Petitioner, despite two opportunities to do so, has not shown the findings of the court to be erroneous.^{13/} The high discharge rate among blacks, and the presence of an overwhelmingly white supervisory staff, the group most likely to make recommendations for discharge or demotion;^{14/} the fact that the job from which Ms. Vaughn was demoted was held largely by whites and the job to which she was demoted was held largely by blacks; the fact that she was replaced by a white employee (Tr. 15); the

^{13/} See, United States v. Yellow Cab Co., 338 U.S. 338 (1949).

^{14/} Subjective selection processes involving white supervisors provide a ready mechanism for racial discrimination. Robbins v. White-Wilson Medical Clinic, 642 F.2d 153, Cir. 1981). James v. Stockham Valves & Fittings Co., 559 F.2d 310, 345 (5th Cir. 1977) cert. denied, 434 U.S. 1034 (1978).

fact that blacks were often harassed by supervisors and subjected to work demands different from their white counterparts; the fact that the ongoing frictions between black employees and petitioner's all-white supervisory workforce were particularly acute on Ms. Vaughn's shift,^{15/} all suggest a working environment in which employment decisions are likely to be permeated with racial animus. In the cases of Ms. Crutcher and Ms. Gee, the trial court, on reviewing the evidence, found that they had not established by a preponderance of the evidence that they had been discriminated against. On the other hand, in the case of Ms. Vaughn, after twice reviewing the entire record in the case the trial court reaffirmed its holding that the respondent had met that burden. Clearly the district court did not

^{15/} Vaughn, 471 F.Supp. at 285. (J.A. 328-329).

rely on statistical and background evidence alone in finding that Ms. Vaughn's demotion was motivated by impermissible racial considerations.

III.

The Circuit Court's Have Consistently
And Appropriately Applied The McDonnell
Douglas-Burdine Formulation

The courts of appeal have generally understood that McDonnell Douglas provides an analytical framework for evaluating claims of employment discrimination and they have been sensible and flexible in their application of its standards. Indeed the only controversy concerning this issue has involved the nature of the showing a defendant must make in order to rebut plaintiff's prima facie case.^{16/}

^{16/} This controversy was resolved, however, by this Court's ruling in Burdine, 450 U.S. 248 (1981).

Now, with this Court's recent opinion in Aikens, there would seem to be even less room for confusion regarding the balancing of burdens or other legal rituals. Rather, once the parties have made their presentations, and the defendant has done all that would be required of him assuming that the plaintiff has made out a prima facie case,

The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiffs.' Burdine, supra at 253, 67 L.Ed. 2d 207, 101 S.Ct. 1089.

Aikens, 75 L.Ed.2d at 410.

Nothing more clearly illustrates this general lack of confusion than the petitioner's failure to cite specific examples of such purported confusion from any circuit other than the Eighth.^{17/}

^{17/} Indeed, even the Eighth Circuit cases cited by the petitioner do not evidence confusion or any failure to understand the appropriate approach under McDonnell Douglas - Burdine. Rather, Johnson v. Bunny Bread Co., 646 F.2d 1250, 1254-1255 (8th Cir.

IV

An Employer Cannot Escape Liability Under Title VII Once Discriminatory Animus Has Been Shown to Have Been A Substantial Factor In An Employment Decision

Petitioner's attempted reliance on the decision of this Court in Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) is misplaced.^{18/}

^{17/} continued

(1981); Locke v. Kansas City Power & Light Co., 660 F.2d 359 (8th Cir. 1981); Robinson v. Arkansas State Highway and Transportation Commission, 698 F.2d 957 (8th Cir. 1983) and Danzl v. North St. Paul Maplewood-Oakdale Independent School District No. 622, 706 F.2d 813 (8th Cir. 1983), all involve reviewing courts bearing their obligation to review the record as a whole, weighing the general policy or statistical evidence if it was available, and overruling the district court if there was an inappropriate application of the standard or a finding that the lower court's findings were clearly erroneous.

^{18/} In addition, this issue is simply not present here in that the record does not support a single, clearly defined and untainted reason for Ms. Vaughn's disqualification.

The issue before this Court is whether the evidence taken as a whole was sufficient for the district court to have drawn an inference of discrimination, i.e., whether that evidence establishes a violation of Title VII.

Respondent contends that the legislative history of Title VII makes it clear that Congress intended that if race played any part in an employment decision then a violation of the statute has occurred. Therefore, the issue of whether other factors would have resulted in the same employment decision in the absence of discrimination, only effects the remedy that is appropriate, not whether there has been a substantive violation to begin with.

The legislative history of the 1964 Act makes clear Congress was convinced that discrimination in all facets of American life, including employment, was pervasive

and needed to be rooted out in toto. Thus, the House Report states that its purpose "is to eliminate" discrimination by protecting the rights of all persons "to be free" from it.^{19/} Senator Humphrey, the floor leader in the Senate, similarly stated that the bill makes "it an illegal practice to use race as a factor in denying employment."^{20/} And the Senate rejected a proposal by Senator McClellan to amend Section 703(a)(1) which defines the substantive violations of Title VII, so that personnel actions were prohibited only if they were taken "solely because

^{19/} H. Rep. No. 88-914 (88th Cong. 1st. Sess.), reprinted in Legislative History of Title VII and XI of Civil Rights Act of 1964 (United States Equal Employment Opportunity Commission)(Hereinafter Legis. Hist. of Title VII), at p. 2026. See also remarks of Sen. Byrd, id at 3119, Cong. Rec., Senate June 9, 1964, p. 13169.

^{20/} Id. at 3107, Cong. Rec., Senate, June 9, 1964, p. 13088 (Emphasis added).

of race, etc." ^{21/} The amendment was opposed by the Bill's sponsors because it would make it impossible to prove a violation. ^{22/}

Similarly, in 1972 when Congress reenacted and amended substantial portions of Title VII ^{23/} it made it clear that in its view employment discrimination was so pervasive that it had to be extirpated completely. For example, added to Title VII was Section 717 (42 U.S.C. § 2000e-16) which extended the provisions of Title VII to federal agencies. As this Court has held, the purpose of Section 717 was to make the same substantive law governing the private sector applicable to the federal government. Morton v. Mancari, 417 U.S. 535, 547 (1974).

^{21/} Id. at 3124, Cong. Rec., Senate, June 15, 1964, pp. 13837-838.

^{22/} Ibid.

^{23/} The Equal Employment Opportunity Act of 1972, P.L. 92-261.

Section 717 provides that "all personnel actions affecting [federal employees] . . . shall be made free from any discrimination based on race, color, religion, sex or national origin." (Emphasis added.) The clear language of this section would make it impermissible in the federal sector to hold that an employment action in which race played any part did not violate Title VII.

The legislative history of the 1972 Act leads to the conclusion that the same standards expressly stated in Section 717 should be applied to all other employers, including those in the private sector. Thus, Senator Williams, the floor manager of 1972 Act spoke of the need to "end job discrimination in our society."^{24/} Throughout

^{24/} Legislative History of the Equal Employment Opportunity Act of 1972, Prepared by the Subcommittee in Labor of the Committee on Labor and Public Welfare, United States Senate (1972), (hereinafter, Leg. Hist., 1972 Act), p. 1767.

the debates are references to the need to eliminate all remaining vestiges of discrimination. ^{25/}

Finally, the decision in Mt. Healthy was based in large part on a concern that employees could insulate themselves from planned personnel actions by the simple expedient of engaging in First Amendment activities. 429 U.S. at 286. In the case of discrimination based on race, of course, the employee has no such power.

The record in this case clearly supports the conclusion that the employment decision challenged here was influenced by racial discrimination. Thus, respondent Vaughn was one of the few blacks to hold the

^{25/} See, e.g., remarks of Senator Williams, Leg. Hist., 1972 Act at 653, speaking of the need of "eradicating employment discrimination" and the remarks of Senator Humphrey, the chief sponsor of the 1964 Act, at Leg. Hist. pp. 670-71.

position. She was demoted by a new supervisor despite her one year performance in the position which another supervisor had initially stated was satisfactory, and there were no concrete objective standards used to measure her performance against that of her white peers. It follows that the district court was clearly correct in concluding that racial discrimination was a significant element in the decision to remove her from the job held and to put her into a lower paying position.

The purposes of Title VII would be totally frustrated if an employer could evade responsibility for such actions by asserting that racial discrimination was only one of many factors which resulted in the employment decision at issue.

CONCLUSION

For the foregoing reasons, the decision
of the court below should be affirmed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CLYDE E. MURPHY*
CHARLES STEPHEN RALSTON
O. PETER SHERWOOD
RONALD L. ELLIS
JUDITH REED
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

JOHN W. WALKER
1191 First National Building
Little Rock, Arkansas 72201

ZIMMERY CRUTCHER, JR.
Mays, Crutcher & Brown
Suite 836
One Union National Plaza
Little Rock, Arkansas 72201

Counsel for Respondent

*Counsel of Record